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No. 75-1280

In the Supreme Court of the United States

OCTOBER TERM, 1975

ALEXANDER J. BARKET, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-14 to A-26) is reported at 530 F.2d 181. The opinion of the district court (Pet. App. A-1 to A-13) is unreported. Prior opinions of the district court are reported at 380 F. Supp. 1018, 65 F.R.D. 410, and 64 F.R.D. 573.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1975. A petition for rehearing *en*

banc was treated by the court as a petition for rehearing and denied on February 9, 1976 (Pet. App. A-27). The petition for a writ of certiorari was filed on March 9, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a pretrial order declining to dismiss an indictment on double jeopardy grounds may be appealed by the accused prior to trial.

2. Whether petitioner, who was acquitted on one count of a two-count indictment charging related offenses, can be tried on the remaining count consistently with the principles of double jeopardy and collateral estoppel.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * *

28 U.S.C. 1291 provides in relevant part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * *.

STATEMENT

Petitioner is the president of a national bank. He was charged in a two-count indictment with offenses

growing out of an alleged contribution of bank money in 1968 to a candidate for President. Count I charged petitioner with consenting to the contribution of $7,500 of the bank's money, in violation of 18 U.S.C. 610. Count II charged him with willfully misapplying $9,144 of the bank's money, in violation of 18 U.S.C. 656. The money was "misapplied," the indictment alleged, because it ostensibly had been given as a "bonus" to a bank official but actually was paid by the official as a political contribution.[1] The two counts were severed for trial.[2] The government elected to try Count II first. After a nonjury trial the court acquitted petitioner.

Petitioner then moved to dismiss Count I. He argued that trial on Count I would be barred by the Double Jeopardy Clause and principles of collateral estoppel. The district court denied the motion. Petitioner immediately filed an appeal.[3] The court of appeals, with Judge Stephenson dissenting, held (Pet. App. A-18 to A-21) that the denial of the double

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[1] The difference between the $7,500 specified in Count I and the $9,144 specified in Count II was allegedly retained by the bank official to recompense him for his income tax liability on the "bonus" he purportedly received.

[2] The record does not reflect at whose instance this order was made. The Assistant United States Attorney who attended the pretrial conference informs us that the court ordered the severance on the oral motion of petitioner's counsel.

[3] Petitioner also filed a petition for a writ of mandamus, which the court of appeals denied (Pet. App. A-21, A-25) in light of its holding on appealability.

jeopardy claim was immediately appealable under the "collateral order doctrine" of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541. It therefore entertained his appeal on that ground, but it dismissed the appeal insofar as petitioner argued that the indictment fails to charge an offense and that 18 U.S.C. 610 is unconstitutional. The court then unanimously rejected the double jeopardy claim on the merits (Pet. App. A-21 to A-25).

ARGUMENT

1. a. The court of appeals held that it had jurisdiction to entertain petitioner's double jeopardy claim. We believe that this jurisdictional decision requires review by this Court, which may notice lack of a lower court's jurisdiction *sua sponte*. *Liberty Mutual Insurance Co.* v. *Wetzel*, No. 74-1245, decided March 23, 1976; *Mansfield, Coldwater & Lake Michigan Ry.* v. *Swan*, 111 U.S. 379. We believe that the importance of the issue makes it appropriate to grant the petition in order to resolve a jurisdictional problem of substantial practical importance, as it did in *DiBella* v. *United States*, 369 U.S. 121.[4]

[4] In *DiBella* the court of appeals had held that an order denying a pretrial motion to suppress evidence was appealable, but the court rejected DiBella's claim on the merits. *DiBella* v. *United States*, 284 F.2d 897 (C.A. 2). DiBella petitioned for a writ of certiorari to review the merits of the suppression claim. The Court granted the petition (over the Solicitor General's opposition, which noted the jurisdictional problem), and vacated the judgment, instructing the court of appeals to dismiss for want of jurisdiction.

b. The question whether the pretrial denial of a double jeopardy claim is an appealable "final" order within the meaning of 28 U.S.C. 1291 is one of increasing importance. Four courts of appeals now allow immediate appeals from such pretrial orders. In addition to the decision below, see *United States* v. *Lansdown*, 460 F.2d 164, 170-172 (C.A. 4); *United States* v. *Beckerman*, 516 F.2d 905, 906-907 (C.A. 2);[5] *United States* v. *DiSilvio*, 520 F.2d 247, 248, n. 2a (C.A. 3), certiorari denied, December 8, 1975 (No. 75-352); *United States* v. *Starks*, C.A. 3, Nos. 75-2071, 75-2072, and 75-2073, decided February 10, 1976, petition for a writ of certiorari pending *sub nom. Abney* v. *United States*, No. 75-6521.[6] Cf. *Thomas* v. *Beasley*, 491 F.2d 507 (C.A. 6) (grant of a pretrial writ of *habeas corpus* on double jeopardy grounds). The Fourth Circuit, moreover, has extended its rule to allow immediate appeals from pretrial orders denying speedy trial claims. *United States* v. *MacDonald*, Nos. 75-1870 and 75-1871, decided January 23, 1976, rehearing *en banc* denied April 30, 1976;[7] *United States* v. *Piluso*, No. 76-

[5] See also *Caputo* v. *United States*, C.A. 2, No. 75-1412, decided March 15, 1976.

[6] The issue is presently before the Ninth Circuit as well. *Young* v. *United States*, No. 75-3102.

[7] Chief Judge Haynsworth and Judges Craven and Widener dissented from the denial of *en banc* consideration.

1274, motion to dismiss the appeal denied March 31, 1976.[8]

The Fifth Circuit, however, has explicitly held that pretrial orders rejecting double jeopardy claims are not immediately appealable. *United States* v. *Bailey*, 512 F.2d 833, 836-838. The court of appeals in this case recognized the conflict (Pet. App. A-19), and Judge Stephenson, dissenting in part, would have followed *Bailey* (Pet. App. A-26).

c. The settled principle, embodied in 28 U.S.C. 1291, is that an appeal ordinarily must await final judgment in the district court. "The general principle of federal appellate jurisdiction, derived from the common law and enacted by the First Congress, requires that review of *nisi prius* proceedings await their termination by final judgment." *DiBella* v. *United States*, *supra*, 369 U.S. at 124. "The purpose of the statute [governing appeals] is to give review in one proceeding after final judgment of matters in controversy in any given case." *Heike* v. *United States*, 217 U.S. 423, 430.

This principle is no mere rule of convenience. It is necessary to ensure the effective administration of the criminal justice system. "This insistence on finality and prohibition of piecemeal review," the Court explained in *DiBella*, "discourage undue litigiousness and leaden-footed administration of justice, particularly damaging to the conduct of criminal cases" (369 U.S. at 124). In light of the central role of this principle in criminal cases, this Court has permitted pretrial appeal only when a statute explicitly so provides.[9]

[8] *Piluso* became moot when the district court dismissed the indictment on another ground.

This Court long ago indicated that the pretrial denial of a double jeopardy claim is an unappealable interlocutory order. *Rankin* v. *The State*, 11 Wall. 380, held that a reversal by a state supreme court of a pretrial dismissal of a state indictment on double jeopardy grounds was not a "final judgment or decree" that could be appealed to this Court. Review could be had, it wrote, only after a final judgment of

[9] This case demonstrates how much delay can be created by permitting interlocutory appeals of this nature, and why such delay "is fatal to the vindication of the criminal law" (*Cobbledick* v. *United States*, 309 U.S. 323, 325). Petitioner's claims were rejected by the district court on July 15, 1975. Although the court of appeals found the claims to be insubstantial, ten months have passed and a trial on the charge still cannot be set until this Court has heard the case or denied certiorari. Similarly, the order denying the motion to dismiss in *Abney*, *supra*, which the court of appeals eventually affirmed without written opinion or oral argument, was entered on September 2, 1975, over eight months ago. In *Young* (see note 6, *supra*) the district court entered its order on August 8, 1975, and an appeal was filed on August 20. Despite the filing of a motion to dismiss the appeal for lack of jurisdiction, the case is still in the court of appeals; it has not yet been argued.

The delay in each of these cases has been caused primarily by the double jeopardy claim. But in *Abney* the defendants also alleged that the indictment failed to charge an offense; the court of appeals considered that claim as well. The potential for delay caused by joining a colorable statutory claim to a frivolous double jeopardy claim is immense.

conviction. *Heike* v. *United States*, *supra*, held that the Court had no jurisdiction to entertain a pretrial appeal from the denial of a comparable plea in bar (there of statutory immunity). The Court analogized a plea of statutory immunity to a plea of former jeopardy; it relied on and reaffirmed *Rankin*, writing (217 U.S. at 432) that "the overruling of a plea of former conviction or acquittal has never been held, so far as we know, to give a right of review before final judgment." See also *Eastman* v. *Ohio*, 299 U.S. 505; *Berman* v. *United States*, 302 U.S. 211, 212-213 (judgment not final until sentence is imposed); *Cogen* v. *United States*, 278 U.S. 221 (an order denying a pretrial motion to suppress evidence is not appealable); *Parr* v. *United States*, 351 U.S. 513 (orders dismissing an indictment and setting trial in another district are not appealable).[10]

d. The finality principle sometimes yields to other considerations. When a pretrial order relates to a matter collateral to the cause of action, when the collateral claim can be heard on appeal without delaying the main action, and when the collateral claim would be effectively unreviewable (at great loss to one of the parties) if appeal were delayed, courts may entertain a pretrial appeal. *Cohen* v. *Beneficial*

[10] "True, the petitioner will have to hazard a trial under the Austin indictment before he can get a review of whether he should have been tried in Laredo under the Corpus Christi indictment, but 'bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship.' *Cobbledick* v. *United States*, *supra*, at p. 325" (351 U.S. at 520).

Industrial Loan Corp., 337 U.S. 541. Assuming that this exception is applicable to criminal cases in the absence of a statute indicating Congress's acceptance of it (a matter not free from doubt),[11] we submit that its conditions are not fulfilled here.

A double jeopardy claim is not entirely "collateral" to the main cause of action. The central issue litigated in a criminal case is "the right to convict the accused of the crime charged in the indictment" (*Heike*, *supra*, 217 U.S. at 429; *Parr* v. *United States*, *supra*, 351 U.S. at 518-519). A double jeopardy claim is simply one reason (albeit a reason founded on the Constitution) why there should be no conviction. It is also on some occasions a reason why there should be no trial at all, but that aspect cannot be severed from the other issues involved. Too, a double jeopardy claim cannot be appealed "without halting the main trial." *Stack* v. *Boyle*, 342 U.S. 1,

[11] Because of the pressing need for expeditious resolution of criminal cases, this Court has held many times that the principles governing civil appeals cannot be transferred wholesale to criminal appeals. It has confined criminal appeals more closely to the literal terms of governing statutes. It has used the "collateral order doctrine" of *Cohen* only once to support jurisdiction in a criminal case. *Stack* v. *Boyle*, 342 U.S. 1 (order relating to the amount of bail). As *Stack* and *Carroll* v. *United States*, 354 U.S. 394, make clear, however, the "collateral order doctrine" in criminal cases applies to very few situations involving issues truly distinct from the central question of the propriety of conviction. *Carroll* itself held that in the absence of statutory authorization the government could not appeal an order suppressing evidence, even though the order likely would be the death knell of the prosecution.

12 (Jackson and Frankfurter, JJ., concurring). Finally, although the district court's improper rejection of a double jeopardy claim would lead to a trial that should not take place, the rights of the accused "will [not thereby] have been lost, probably irreparably" (*Cohen, supra*, 337 U.S. at 546). Protection against repetitious trials is but one goal of the Double Jeopardy Clause. An equally important aspect is the prohibition of punishments after the accused has been either convicted or acquitted for the same offense, a prohibition that can be fully enforced by an appeal in the event of conviction. See *Green* v. *United States*, 355 U.S. 184, 187-188; *North Carolina* v. *Pearce*, 395 U.S. 711, 717; *United States* v. *Wilson*, 420 U.S. 332, 343.[12]

We do not doubt the importance of preventing repetitious trials in contravention of the Clause. This interest in avoiding the trial itself, however, extends only to ordinary claims of prior conviction or acquittal on the same charge. In our view it does not extend to claims of collateral estoppel such as are in part advanced by petitioner, for that principle, although embodied in the Double Jeopardy Clause, is a principle forbidding the prosecution to prove particular factual propositions, not a principle forbidding a

[12] A defendant denied interlocutory access to appellate review is thus not as irretrievably injured as the prosecution, when the latter is similarly denied such access, since ordinarily the prosecution's claims will either be mooted by a conviction or lost without any possibility of review by a verdict of acquittal.

trial.[13] And even when a claim of prior conviction or acquittal on the same charge is presented, an accused's claim always is reviewed by the district court. There is no reason to believe that substantial numbers of valid double jeopardy claims are improperly rejected.[14]

While there may be a sufficiently compelling need to justify affording some access to prompt review when a clearly valid double jeopardy claim is improperly rejected, relief by way of mandamus should suffice to serve that need. The availability of that

[13] But see *Harris* v. *Washington*, 404 U.S. 55, in which the Court entertained a collateral estoppel claim and indicated that it involved "a claim that the Constitution forbids a second *trial* of the petitioner, a claim separate and apart from the question whether the petitioner may constitutionally be *convicted* of the crimes with which he is charged" (404 U.S. at 56; emphasis in original). *Harris* was decided without the benefit of briefs or argument, and, for the reasons indicated in the text, we believe that the quoted language should be deemed open to reexamination.

[14] The costs associated with standing trial are not confined to double jeopardy cases. A violation of the Speedy Trial Clause, an indictment charging a violation of an unconstitutional statute, an indictment that fails to state an offense, an indictment returned by a racially-exclusive grand jury—these situations and more may cause a defendant to undergo a trial in violation of the Constitution. See also note 16, *infra*. Yet it has been settled (at least until recently) that the costs associated with a system of pretrial appeals would far outweigh the costs incurred by the few defendants whose valid constitutional claims are improperly rejected by district courts. The court of appeals recognized part of this principle by declining to entertain petitioner's claim that the indictment charged a violation of an unconstitutional statute (Pet. App. A-21).

writ in appropriate cases would minimize the risk that defendants with truly meritorious claims would improperly be compelled to stand trial, yet it would accomplish this end at a cost that is not prohibitive. Because mandamus would not lie except to correct a clear error, problems of delay that would be caused by the routine pretrial appeal of double jeopardy decisions could be avoided.[15]

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[15] In *Harris* v. *Washington, supra,* the Court held that its jurisdiction was properly invoked when the state courts had denied a pretrial writ of prohibition. It did so without citing or distinguishing the seemingly inconsistent decisions in *Rankin, supra,* and *Heike, supra.* In *Harris* state law had permitted immediate review of the trial court's order rejecting a double jeopardy claim; the further review sought in this Court, therefore, merely extended a disruption which state law countenanced. See *Mercantile National Bank* v. *Langdeau,* 371 U.S. 555, 558, upon which *Harris* relied. See also *Turner* v. *Arkansas,* 407 U.S. 366; *Colombo* v. *New York,* 405 U.S. 9; *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 476-487 (discussing "finality" of a pretrial decision by a state supreme court). The claim in *Harris* was presented to the state appellate court by a petition for a writ of prohibition, a procedure that might successfully be used in the federal system as well. The availability of prohibition or mandamus would afford the protection of the Double Jeopardy Clause where clearly valid claims are presented. Allowing a defendant to seek mandamus would not unnecessarily delay proceedings in other cases, however. Although the mere filing of a notice of appeal serves to halt proceedings in the trial court that concern the subject matter of the appeal or would affect the appeal (*Newton* v. *Consolidated Gas Co.,* 258 U.S. 165, 177; *Hovey* v. *McDonald,* 109 U.S. 150, 157), only the actual grant of a writ of prohibition or mandamus affects the power of the inferior court. We recognize, however, that our suggestion that mandamus might be available in a criminal case, when appeal is not,

The conclusion reached by the court of appeals allows many cases to be delayed so that a few erroneous decisions can be corrected before trial. Many defendants could frame an insubstantial double jeopardy or collateral estoppel claim if they believed delay helpful to their cause. Moreover, as *MacDonald* (in which the Fourth Circuit allowed pretrial appeal of a speedy trial claim) demonstrates, the rationale of the decision in the instant case could be extended to permit pretrial appeal of many constitutional claims.[16] The benefits of such review, however,

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arguably is inconsistent with *Parr, supra,* and with *Will* v. *United States,* 389 U.S. 90. If certiorari is granted, our brief on the merits will discuss this problem more thoroughly.

[16] Numerous provisions of the Constitution arguably forbid not only a conviction but also the judicial proceedings leading to a conviction. (1) The Speech and Debate Clause (Article I, Sec. 6, cl. 1) provides that a member of Congress "shall not be questioned in any other place" for his official acts. See *McSurely* v. *McClellan,* 521 F.2d 1024 (C.A. D.C.) (rehearing *en banc* pending on merits only) and *Rowley* v. *McMillan,* 502 F.2d 1326 (C.A. 4) (the former holding that in civil cases an immediate appeal lies from a pretrial order rejecting a defense of legislative or official immunity and the latter that mandamus lies). Cf. *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491; *Gravel* v. *United States,* 408 U.S. 606. (2) Because the only remedy for denial of a speedy trial is dismissal of the indictment (*Strunk* v. *United States,* 412 U.S. 434), it could be argued that the Sixth Amendment forbids the trial itself. The Fourth Circuit so held in *MacDonald, supra,* although we believe that this holding not only is erroneous under settled principles of appealability but also mistakes the principles underlying the Speedy Trial Clause. See *Barker* v. *Wingo,* 407 U.S. 514. (3) The Grand Jury Clause of the Fifth Amendment provides that no individual shall be "held to answer" for a capital or in-

carry too dear a price. The Court should reaffirm the rule that, in the absence of a statute authorizing pretrial review, the "correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before reconsideration by an appellate tribunal" (*Cobbledick* v. *United States, supra,* 309 U.S. at 325-326).

2. Relying principally on *Ashe* v. *Swenson,* 397 U.S. 436, petitioner argues that principles of collateral estoppel foreclose his trial on Count I of the indictment. This is so, he contends, because the same evidence will be offered to prove Count I as previously was offered and found insufficient to support a conviction under Count II. The court of appeals correctly rejected this claim.[17]

famous crime except upon indictment. Because this protection may be implicated any time an indictment is altered (*Ex parte Bain,* 121 U.S. 1), it could be a fruitful source of pretrial appeals, even when the alteration is perfectly proper. (4) Trials instituted as part of a bad faith campaign to "chill" First Amendment rights also might fall into a prohibited category. See *Dombrowski* v. *Pfister,* 380 U.S. 479. Cf. *Allee* v. *Medrano,* 416 U.S. 802 (federal injunction against state proceedings used to harass people exercising other constitutional rights). Harassment and bad faith are easy to allege and difficult to prove. (5) Trial also might be barred if the prosecution were founded on racially discriminatory reasons (*Yick Wo* v. *Hopkins,* 118 U.S. 356) or were the result of unconstitutionally discriminatory enforcement. Such claims, while seldom meritorious (see *Oyler* v. *Boles,* 368 U.S. 448, 456), are often made. (6) It is not difficult to invent other cases, and this Court's decisions under the civil rights removal statutes (*Johnson* v. *Mississippi,* 421 U.S. 213; *Georgia* v. *Rachel,* 384 U.S. 780; *Greenwood* v. *Peacock,* 384 U.S. 808) discuss circumstances under which a trial itself would be a violation of constitutional rights.

"[W]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe* v. *Swenson, supra,* 397 U.S. at 443. In order to ascertain whether an "ultimate fact" has been "determined," it is necessary to inquire whether the prior verdict could have been

[17] Petitioner also contends that trial on Count I is barred directly by his acquittal on Count II because the two counts charge the same offense (Pet. 8). Stating that "it is not necessary to dwell at length on the oft-times thorny issue of double jeopardy" (*ibid.*), he does not elaborate on this contention, except to point out that both counts arise from the same political contribution. The critical inquiry, however, is whether the statutory offenses are the same, not whether the offenses arise from the same events or whether the same evidence is offered to prove them. *Blockburger* v. *United States,* 284 U.S. 299, 304; *Gore* v. *United States,* 357 U.S. 386, 389, 392-393; *Harris* v. *United States,* 359 U.S. 19, 23-24. In this regard, it is clear that 18 U.S.C. 610, which prohibits an officer of a national bank from consenting to a contribution in connection with a public election, creates an offense with elements quite distinct from those of 18 U.S.C. 656, which prohibits the willful misapplication of bank funds with intent to defraud or injure the bank. Since each statute requires proof of a fact not required with respect to the other, prosecution and punishment for violation of both statutes does not violate the Double Jeopardy Clause, even though both offenses arise from the same transaction and even though the same direct evidence may be offered as to both offenses. *Iannelli* v. *United States,* 420 U.S. 770, 785, n. 17; cf. *United States* v. *Gaddis,* No. 74-1141, decided March 3, 1976, slip op. 6 (it is appropriate to indict a defendant on multiple counts arising out of the same bank robbery).

grounded upon "an issue other than that which the defendant seeks to foreclose from consideration" (*id.* at 444). The district court that rendered the verdict of acquittal in the first trial is in the best position to evaluate what it did or did not decide. Here the same judge who acquitted petitioner on Count II rejected his claim that this acquittal resolved critical facts in petitioner's favor (Pet. App. A-4 to A-6).[18]

[18] Petitioner relies upon certain oral statements made by the judge at the time a judgment of acquittal on Count II was entered. He contends that these statements constitute findings which support his collateral estoppel claim. But the same judge who made the statements thought otherwise, and the court of appeals, on whose opinion we rely, agreed (Pet. App. A-23 to A-24; footnote omitted):

> The statements referred to were made from the bench at the close of the evidence at the trial on Count II. They lack the clarity which could be found in written findings of fact. It is therefore difficult to determine what factual issues the trial judge intended to resolve by the statements. .
>
> * * * * *
>
> [Petitioner] points, first, to the trial court's assertion that the evidence did not support a finding that [he] acted "wilfully." It is not at all clear what the trial judge meant by his use of the word "wilful." He might have meant to say that [petitioner] did not act for the specific purpose of violating § 656, or to assert again that [petitioner] did not act to injure the bank. If so, this "finding" of lack of wilfulness is irrelevant to the § 610 charge.
>
> Similarly, the court found "there was an equal failure of proof on the part of the government that the purpose of the defendant's action was the making of an 'illegal' political contribution." This comment was made in the midst of a discussion of the requirement that a § 656 misapplication necessarily involve a conversion. The court emphasized the word "illegal." It might well have meant to say, not that the government failed to prove the political contribution, but that it failed to prove that the contribution resulted from an unauthorized, i.e., "illegal," conversion of bank funds. Conviction under § 610 does not require that the contribution of bank funds be unauthorized. If the sentence quoted is given this meaning, prosecution under § 610 remains possible.

The court accordingly held that petitioner failed to sustain his burden "to show that the verdict or the findings of the court in the prior case necessarily foreclosed an issue essential to the subsequent prosecution" (*id.* at A-25). See *United States* v. *Gugliaro*, 501 F.2d 68, 70 (C.A. 2).

The court of appeals independently analyzed the claim and reached the same conclusion (Pet. App. A-24):

> [T]he one issue on which the trial court unquestionably found a failure of proof is not essential to a § 610 proceeding [Count I]. The court ruled that the government had failed to prove that [petitioner] acted for the purpose of injuring and defrauding his bank. As observed, this is not an element of the § 610 offense, so that this finding does not preclude conviction under that statute.

The prosecution simply failed to prove the essential element of the charge under Count II—willful misapplication of bank funds *with the intent to defraud or injure* the bank. This entirely accounts for the verdict of acquittal on that count. The verdict therefore does not necessarily rest upon the issue which petitioner "seeks to foreclose from consideration" in the trial under Count I, that is, whether he consented to the making of an unlawful campaign contribution.

CONCLUSION

The petition for a writ of certiorari should be granted.[19]

Respectfully submitted.

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[19] Although we believe that the jurisdictional issue presented by this case requires review, it may be that the Court should grant the petition in *Abney* v. *United States*, No. 76-6521, instead of or in addition to the petition in this case. In *Abney*, the court of appeals not only entertained an appeal on a double jeopardy claim but also passed upon appellants' argument that the indictment does not charge an offense. *Abney* therefore presents the additional question whether, if a court of appeals has jurisdiction over the pretrial appeal of the double jeopardy claim, it has jurisdiction over other claims as well. (Petitioner Barket appealed on three claims; the court of appeals dismissed two of them, and petitioner has not sought review of that portion of the court of appeals' judgment.) Although *Abney* therefore might be the better case to review, the court of appeals there wrote no opinion, and we cannot be sure that it intended to set a precedent for review of claims pendant to a double jeopardy claim. This Court also would necessarily be required to rule without the benefit of the views of the court of appeals. We therefore take no position whether it would be preferable to grant certiorari in this case alone, in *Abney* alone, or in both cases.

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